82-1656

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO.

CAROLYN MC KENDRICK

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA

Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

STEPHEN H. SEROTA, ESQUIRE
Suite 400
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Philadelphia, PA 19107
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IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

PHILADELPHIA COUNTY

TRIAL DIVISION - CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA

V.

CAROLYN McKENDRICK

SUPREME COURT NO. 256

January, 1979

Appeal from the Judgments of Sentence of the Court of Common Pleas of Philadelphia, June Term, 1977, Nos. 1206, 1208

OPINION

LATRONE, J. Filed JANUARY 19, 1982

Carolyn McKendrick, the defendant, was charged with a criminal homicide and related weapons offenses resulting from her "love-nest" shooting of Tyrone Everett, a South Philadelphia pugilist of national renown,

in the second floor front bedroom of her residence at 2710 Federal Street here in Philadelphia at about 11:00 o'clock a.m. on May 26, 1977. Following a trial before this Court sitting with a jury, McKendrick was convicted of murder of the third degree and possession of an instrument of crime. A jury verdict of not guilty was returned on a separate criminal information charging possession of a controlled substance with intent to manufacture or deliver which resulted from police confiscation of the bundles of heroin at the McKendrick residence shortly after the fatal shooting. Prior to trial, without objection from defense counsel, the Commonwealth elected not to proceed on a fourth and last criminal information covering the charge of involuntary manslaughter. Since this Court nol prossed this charge of involuntary manslaughter on the Commonwealth's motion following the trial, it is now reminded that it is forever barred from future prosecution of this charge which arose from

the same conduct or resulted from the identical criminal episode or transaction. Commonwealth v. Campana, 452 Pa. 233, 304 A.2d 432 (1973) (Campana I) and Campana II, 455 Pa. 622, 314 A.2d 854 (1974); Commonwealth vs. Tarver, 467 Pa. 401, 357 A.2d 539 (1976): Commonwealth v. Holmes, 480 Pa. 536, 391 A.2d 1015 (1978); Commonwealth vs. Edwards, 264 Pa. Super. 223, 399 A.2d 747 (1979); Section 110 of the Crimes Code, 18 Pa.C.S.A. #110 (effective June 6, 1973).

Post-verdict motions were filed, argued and denied. This Court imposed concurrent sentences of 5 to 10 years and 2-1/2 to 5 years for McKendrick's conviction of murder of the third degree and possession of an instrument of crime. The instant appeals are from these judgments of sentence. In compliance with the requirements of Pa.R.A.P. 906(2), this Court has received copies of Notices of Appeal from these sentences to both the Supreme and Superior Courts of Pennsylvania. It is assumed that

defense counsel subsequently effected a consolidation of such appeals. See, Pa.R.A.P.513; Appellate Court Jurisdiction Act, Act of July 31, 1970, P.L. 673, No. 223, Act. V,§503 (c), 17 P.S. §211.503(c) (1979-1980 Pocket Part.)

Despite the fact that McKendrick's attorney filed the required written post-verdict motions, it is submitted that only the following designated grounds have been preserved for appellate consideration by the Pennsylvania Supreme Court:

(1) that the trial Court erred in its denial of a defense motion for a mistrial when Doris Everett, deceased's mother, testified as a Commonwealth witness that Ricardo McKendrick defendant's husband, had made contractual agreements with third persons to have the deceased killed:

(2) that the trial court erred in its denial of a defense motion for a mistrial when Doris Everett, deceased's mother, also

testified as a Commonwealth witness that Ricardo McKendrick, defendant's husband, had previously been incarcerated for his conviction of criminal acts;

(3) that the trial Court erred in denying defense motions for mistrial when Teri Price, a Commonwealth witness, made testimonial references to having been administered lie detector tests by the police during his period of custodial interrogation;

(4) that the Court committed reversible error in allowing the Commonwealth to introduce evidence of prior consistent statements made by Teri Price, a Commonwealth witness in its case-in-chief, in order to rehabilitate his credibility as a witness;

(5) that the trial Court erred in its denial of a motion for mistrial when a court clerk, then presented as a rebuttal witness for the purpose of introduction of impeachment evidence concerning defendant's prior conviction for relevant criminal acts, erroneously

testified from an extract of criminal record that the defendant had a prior conviction for the charge of possession of a firearm with a defaced serial number;

(6) that the trial Court erred in admitting evidence of defendant's prior convictions of the charge of receiving stolen goods in order to impeach her credibility as a witness;

(7) that the trial Court erred in its ruling that a .30 caliber Ruger six shooter was admissible as relevant physical evidence, although it was not identified as the identical murder weapon;

(8) that the trial Court erred in its ruling that Police Officer Maroney could not offer testimony pertaining to alleged beatings inflicted upon Christine Smalls by Tyrone Everett, the deceased, in order to establish that the instant killing was perpetrated by the defendant in self-defense of her person;

(9) that the trial Court erred in ruling as inadmissible certain portions of defendant's hospital records which explained her treatment for relevant personal injuries, but which likewise contained hearsay statements to the attending physician explaining how she had been injured;

(10) that the trial Court erred in denying a defense motion for mistrial made in response to the District Attorney's prejudicial and inflammatory comments in closing argument, "That's no plaything. Remember the good times," since such statements deprived the defendant of a fair and impartial trial;

(11) the trial Court erred in denial of motions for mistrial at various trial junctures at which the District Attorney made prejudicial and inflammatory references to defendant's well-furnished home, wearing apparel, possession of large quantities of clothing and shoes, and adulterous relationship with the deceased;

(12) that the record contained insufficient evidence to support the defendant's conviction of the charge of murder of the third degree and possession of an instrument of crime.[1]

Immediately hereafter, each of these twelve assignments of error will be addressed and analyzed seriatim, and since all of them are meritless, it is submitted that this Court properly entered its Order denying post-verdict motions.

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1. As required under Pa.R.Crim.P. 1123 (a), defense counsel filed formal written post-verdict motions within the required ten day period after jury verdict. The first three paragraphs of these original written motions consisted of "boiler-plate" allegations amounting to a sufficiency challenge to the evidence supporting McKendrick's conviction in toto, these motions also contained sixteen grounds in addition to this sufficiency challenge. Thus, the original motions contained allegations in nineteen paragraphs. As is the common and acceptable practice here in the First Judicial District, the closing paragraphs of these initial written motions contained a recital that the defendant reserves the right to file additional reasons after receipt of a copy of the notes of trial testimony. In fact, after receiving a copy of

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(footnote No. 1 is continued)

the transcript of trial testimony, defense counsel submitted "Additional Motions for New Trial And An Arrest of Judgment" which added seven additional reasons to those already set forth in his initial written motions.

It is important to note that only twelve of the reasons included in original and additional written post-verdict motions were briefed and advanced by defense counsel at the time of subsequently conducted oral argument. Exclusive of the eleven grounds which were neither argued nor briefed before it at the post-verdict juncture, this Court considered and evaluated the remaining twelve grounds set forth above which had been filed in written form of post-verdict motions. It is submitted that this Court's consideration of the remaining twelve reasons which are set forth above, exclusive of the eleven grounds which were neither briefed nor argued, preserved them for appellate review. See generally, Commonwealth v. Blair, 460 Pa. 31,331 A.2d 313 1975;
Commonwealth v. Hilton, 461 Pa. 93, 334 A.2d 648 (1975);
Commonwealth v. Terry, 462 Pa. 595, 342 A.2d 92 (1975);
Commonwealth v. Fortune, 464 Pa.367, 348 A.2d 783 (1975);
Commonwealth v. Porillo, 474 Pa. 63, 376 A.2d 635 (1977);
Commonwealth v. Smith, 474 Pa. 550, 379 A.2d 96 (1977);
Commonwealth v. Pugh, 476 Pa. 445, 383 A.2d 183 (1978);
Commonwealth v. Roach, 477 Pa. 379, 383 A.2d 1257 (1978)
Commonwealth v. Waters, 477 Pa. 430, 384 A.2d
Commonwealth v. Jones, 478 Pa. 172, 386 A.2d 496 (1978);

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(Footnote No. 1 is continued)

Commonwealth v. Allen, 478 Pa. 342, 336 A.2d 965 (1978);
Commonwealth v. Hitson, 482 Pa. 215, 393 A.2d 1160 (1978);
Commonwealth v. Carrillo, 483 Pa. 215, 395 A.2d 570 (1978);
Commonwealth v. Gamble, 485 Pa. 418, 402 A.2d 1072 (1979);
Commonwealth v. Twiggs, 485 Pa. 481, 402 A.2d 1374 (1979);
Commonwealth v. Hennessey, 485 Pa. 647, 403 A.2d 575 (1979);
Commonwealth v. Gravely, 486 Pa. 194, 404 A.2d 1296 (1979);
Commonwealth v. Bilhardt, 269 Pa. Super. 95, 409 A.2d 31 (1979);
Commonwealth v. Hue, 269 Pa. Super. 334, 409 A.2d 916 (1979)

Most significantly, although the following eleven grounds were submitted to this Court in written form as post-verdict motions, none of them were briefed or argued before it; (1) that the trial Court's final instructions pertaining to murder of the third degree and voluntary manslaughter were in error; (2) that the trial Court's requested supplemental jury instructions defining malice were incorrect; (3) that the trial Court erred in failing to specifically charge the jury in the language set forth in defense counsel's submitted points for charge pertaining to numerous issues (4) that the trial Court committed reversible errors when it sustained the District Attorney's objections to various remarks in defense counsel's summation to the jury; (5) that the trial court erred in overruling the defense demurrer to the criminal information pertaining to the drug charge in

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(Footnote No. 1 is continued)
this case; (6) that the trial Court erred in permitting the District Attorney to question Teri Price, a Commonwealth witness, concerning whether or not he was selling drugs for the defendant; (7) that the testimony of Detective Volkmar concerning his search at defendant's residence was inadmissible since it arose from an invalid search warrant failing to allege sufficient probable cause information; (8) that the Court erred in allowing the District Attorney to question the defendant concerning the source of her bail money in this criminal proceeding; (9) that the Court erred in allowing District Attorney voir dire questioning of prospective jurors concerning capital punishment; (10) that the admission of items of bloodied clothing, various photographs, and the comments concerning same deprived the defendant of a fair and impartial trial; (11) that the trial Court erred in denying defense motions for mistrial interposed to allegedly prejudicial remarks of the prosecutor at various trial junctures.

Points of error which are raised in written post-verdict motions must be briefed or argued before the trial Court to be preserved for appellate review. Commonwealth v. Williams, 476 Pa. 557, 383 A.2d (1978); Commonwealth v. Holzer, 480 Pa. 93, 389 A.2d 101 (1978); Commonwealth v. VanCliff, 483 Pa. 576, 397 A.2d 1173 (1979); Commonwealth v. May, 485 Pa. 371, 402 A.2d 1008 (1979). Since these eleven reasons were neither briefed nor argued by defense counsel at the post-verdict stage, they are not viable appellate issues and will not be discussed in this Opinion.

McKendrick's first assignment of error pertains to this Court's refusal to grant motions for mistrial in two separate instances in which Doris Everett, deceased's mother, while testifying as a Commonwealth witness, made potentially prejudicial references to the prior criminal record and other purported criminal activity of Ricardo McKendrick, her husband.[2] Both of the objected-to remarks were made during the course of Doris Everett's direct examination by the prosecutor. [N.T. p.p. 108-114]

The first of the challenged remards occurred when the prosecutor was questioning Doris Everett about her deceased son's relationship with the defendant. The full pertinent records context in which the remark was made as follows:

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2. Although this single assignment of error, in fact, emcompasses grounds one and two set forth at the beginning of this Opinion as designated grounds preserved for appellate consideration, it will be treated as one since the claims involve the same witness and substantially similar issues require discussion and analysis.

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"Q. And after that particular time did you have other occasions to talk to him about seeing Carolyn Swint McKendrick?

A. Yes, I did.

Q. Did you give him advice at that particular time about seeing Carolyn Swint McKendrick?

A. Yes, I did.

Q. What was that advice?

A. He was going with Carol. I wouldn't say it was two years. I would say it was about a year and a half, not no two years. <u>And in between that time I heard that her husband was in jail.</u>

MR. SEROTA: Objection, sir, and move for a mistrial.

THE COURT: Sustain the objection. Deny the motion. [Italice added.]"

At this juncture, this Court denied defense counsel's motion for mistrial and immediately delivered the following cautionary instructions:

"The fact of the conviction of someone who is not here on trial is in no way to be a reflection on the defendant. It is obvious that she is on trial. You are to determine the defendant's guilt or innocence on the basis of this trial evidence, and do not assume the perspective of guilt by association. She stands here to be tried on the merits of her own case, not because she is related to someone that may possibly have a criminal record. That is most obvious to you. You are to disregard it."

[N.T. p.p. 108-109]

Upon further questioning on direct examination by the prosecutor, Doris Everett made the second of her cahallenged remarks which appears as follows in this record:

"Q. Mrs. Everett, do you know the husband of Carolyn McKendrick, a person by the name of Ricardo McKendrick?

A. I know of him and I had him to my house but--

Q. When did you have him to your house?

A. When he came home.

Q. When was that?

A. I think it was in July of '76, somewhere around that time.

Q. And in July of '76, why did you have him at your house?

MR. SEROTA: Objection

THE COURT: Overruled

A. Well, from say-so they said that her husband had a contract to have my son killed. [Italics added.]" [N.T. p. 109]

At that juncture, this Court once again denied defense counsel's motion for a mistrial and delivered the following cautionary instruction to the jury:

"Ladies and gentlemen of the jury, I am even hesitant to repeat the remark because, on a practical level, when you repeat a remark it may possibly be prejudicial and you may be worsening the problem, but I can't impart cautionary instructions under the law without repeataing it. Those of much more wisdon, maybe than I have said that you must specifically earmark your instructions and direct them to the remark that you are trying to remedy.

There was some reference to a contract out. You will recall the witness had made reference that she had heard.

There is no direct evidence other than the general hearsay thing that she might have heard in the neighborhood. That in and of itself would not be reliable.

I had previously instructed you that the purported the actual criminality of Ricardo McKendrick, the husband, is in no way to inflame your minds against the defendant. In plain, everyday parlance, maybe some of you have had the misfortune to have members of your family or loved ones to be convicted of a crime. That does not mean that the impropriety of the association or culpability of criminal character should be imposed upon you, to give you a concrete example from everyday life.

So you are not to infer any criminal conduct of Carolyn McKendrick with respect to the remark made by the witness. It is nothing to show any connection or complicity, if such a contract had been made, and there is no reliable evidence to establish it, that the defendant was in any way part of it and in association with it had knowledge of it.

So you are in effect, to ignore the remarks as if it had never been made, and you are to in no way cause that remark to inflame you in a prejudicial fashion against the defendant.

You are in no way to get the hint, the inkling, or the innuendo of any complicity of the defendant in such conduct, to wit, a contract to kill.

Lastly, forget that the remark was made. Erase it from your minds."

[N.T. p.p. 113-114

Since both challenged remarks are quite similar in nature and were made in a quite close time sequence in the context of trial, it is submitted that they can both be analyzed and discussed jointly. In each instance, it is submitted that the sua sponte cautionary instructions from this Court served to eradicate and expunge the potentially prejudicial impact of such challenged remarks upon the minds of the jury.

A trial court's use of curative instructions is an approved and encouraged practice which is normally adequate to remove the taint of prejudicial matters that are brought to a jury's attention. Commonwealth v. Starks, 479 Pa. 51, 387 A.2d 829 (1978). Generally, the standards used to determine the efficacy of cautionary instructions are that they be delivered promptly, that they be specifically tied to the potentially

prejudicial fact or event, and that they be clearly and firmly worked to advise the jury that it must disregard the prejudicial event. Commonwealth v. Shoemaker, 240 Pa. 255, 87 A.684 (1913); Commonwealth v. Martinolich, 456 Pa. 136, 318 A.2d 680 (1974); Commonwealth v. Talley, 456 Pa. 574, 318 A.2d 922 (1974); Commonwealth v. Wiggins, 231 Pa. Super. 71, 328 A.2d 520 (1974). Upon a fair appraisal in the trial context, it is submitted that each of the cautionary instructions delivered by this Court, at the time of each of the challeged remarks, fully met these standards of efficacy, and consequently, they removed the taint of prejudice from the minds of this jury.

Further, the delivery of immediate and effective curative instructions has been held to be an efficacious remedy to cure the impact of sundry and various types of potentially prejudicial events; for example Commonwealth v. Fugmann, 330 Pa. 4, 198 A.99 (1938)

(prejudicial impact of erroneously admitted evidence remedied by curative instructions); Commonwealth v. Senk, 412 Pa. 184, 194 A.2d 226 (1963) (emphatic curative instructions cured prejudicial impact of inadmissible evidence concerning defendant's prior imprisonment for unnatural sex relations); Commonwealth v. Beach, 445 Pa. 257, 284 A.2d 792 (1971) (prejudicial effect of defendant's unrelated conviction cured by prompt and explicit curative instructions); Commonwealth v. Tate, 458 Pa. 541, 388 A.2d 353 (1979); (prejudicial reference by a witness to defendant's use of drugs cured by curative instructions); Of... Commonwealth v. McDuffie, 476 Pa. 321, 382 A.2d 1191 (1978) (failure of trial judge to strike and deliver immediate curative instructions at the time of receipt of prejudicial testimony from a witness warranted the grant of a new trial). A comparative analysis of this case with the train of cases cited clearly discloses that the instant

remarks did not surpass the degree of potential prejudice of the types of remarks held to be curable by cautionary instructions. Moreover, as a distinquishing characteristic, the remarks in the cited cases were mostly directed at the defendant rather than a relative of the defendant, as occurred in this case. Thus, it is submitted that the instant cautionary instructions accomplished their aims of curing the potentially prejudicial impact of the remarks here challenged.

Finally, immediate and effective cautionary instructions have been held to be efficacious in remedying the potentially prejudicial impact of improper conduct or remarks by testifying witness who are related or friendly to the victim or who are hostile to the defendant. Commonwealth v. Dolhancryk, 273 Pa. Super. 217, 417 A.2d 246 (1979); Also see, Commonwealth v. Flood, 302 Pa. 190, 153A. 152 (1930); Commonwealth v. Hawkins, 448 Pa. 206, 292 A.2d 302 (1972); Commonwealth v. Glover, 446 Pa. 492,

286 A.2d 349 (1972); Commonwealth v. Evans, 465 Pa. 12, 348 A.2d 92 (1975). In this case, the jurors had enough common sense to comprehend that Doris Everett, the deceased's mother, would have venomed feelings toward the defendant and anyone related to her by either affinity or consanguinty. Further, there is not an iota of evidence to indicate the the jurors could not follow this Court's instructions that any possible criminal record of defendant's husband should not be imputed to her directly. Further the jurors were quite capable of understanding that Doris Everett's testimony reference to a "contract" was based on unreliable neighborhood hearsay and that there was no evidence connecting her to such an agreement, if it did exist. Moreover, since McKendrick herself later took the stand and admitted that she had fatally shot the deceased, this reference to a "contract" made by another

could not have been as prejudicial as contended within the entire trial context. Lately, this Court's admonition that McKendrick, "stands here to be tried on the merits of her own case" was clear and specific enough to be understood by every member of the jury.

Thus, McKendrick's first assignment of error must be rejected.

McKendrick further complains that this Court erred in refusing her attorney's motion for mistrial in several instances in which Teri Price, a Commonwealth witness, testified that he had been administered polygraph or lie detector tests during police interrogation. A fair appraisal of this record will disclose that the three challenged references made by this witness that he had submitted to polygraph examinations constituted unprovoked, nonresponsive and clearly unexpected answers to the prosecutor's questioning on direct examination.

Early in his direct examination, Price was questioned about the truthfulness of a contradictory statement he gave the police and answered, "The machine says I wasn't telling the truth." At this point, this Court denied a defense motion for mistrial. [N.T. p.o. 478-479]

Shortly thereafter, upon being presented a copy of a second inconsistent written statement taken by the police, Price abortively identified this statement by stating. "The second test I took." At this point, the defense objection was sustained. [N.T. p.p. 482-483] The record discloses that defense counsel did not make a motion for mistrial. A failure to request a mistrial even in trial circumstances where a defense objection is, in fact, sustained to potentially prejudicial trial occurrences means that such an issue is not preserved for appellate review.

Commonwealth v. Hoskins, 485 Pa. 542, 409 A.2d 521 (1979). At the time of the happening of a possibly prejudicial event during the course of adversary trial proceedings, a defendant is only entitled to receive that relief which his attorney has requested from the court. Commonwealth v. Glenn, 459 Pa. 545, 330 A.2d 535 (1974); Commonwealth v. Brown 467 Pa. 512, 359 A.2d 393 (1976); Commonwealth v. Maloney, 459 Pa. 342, 365 A.2d 1237 (1976); Commonwealth v. Hill, 479 Pa. 346, 388 A.2d 690 (1978); Pa.R.Crim.P. 1118. Here, since defense counsel merely interposed an objection which was sustained and did not interpose a motion for mistrial, it is quite evident that, in this instance, he received only that relief requested. Consequently, this specific aspect of this assignment is waived.

Finally, the third and last challenged reference to a lie detector was made when Price

was questioned about a statement he made to the police concerning his acceptance of a drug delivery. In this context, Price answered, "No. The machine said it was untrue." Here, once again, this Court denied defense counsel's motion for mistrial.[3] [N.T. p.p. 490-491]

Additionally, at this juncture and on its own motion, this Court delivered the following cautionary instructions to the jury:

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3. During the course of his own cross-examination of Price, defense counsel elicited three additional answers which made reference to a lie detector test, such as, "Oh, the test," my first test," "first two tests." [N.T. p.p. 551,558, 559] Defense counsel is correct in not asserting these three grounds as part of this assignment of error. First, he himself elicited them on cross-examination. Commonwealth v. Camm, 443 Pa. 253, 277 A.2d 325 (1971). Second, due to the absence of a contemporeous objection in each of the

"The obvious reference obviously the machine would be a lie-detector test. You are to completely disregard any reference to a lie-detector test. You judge this witness' credibility or believability or lack of believability, which is in your sole discretion, from what you are hearing and watching as he is testifying.

You are the truth determiners, not any testing.

As to the reference by the witness, the witness doesn't know the admissible from the inadmissible. The witness is as you all are, a layman. Don't derive any prejudicial reference as the result of his testimony." [N.T. p. 491]

(Footnote No. 3 is continued)

three instances, they are not issues preserved for appellate review. Commonwealth v. Farquarson, 467 Pa. 50, 354 A.2d 545 (1976); Commonwealth v. Pritchett, 468 Pa. 10, 359 A.2d 786 (1976); Commonwealth v. Griffin, 271 Pa. Super. 228, 412 A.2d 897 (1979).

Since only two of Price's testimonal reference that "The machine says I wasn't telling the truth" and that "No. The machine said it was untrue" to have taken a lie detector test are presently viable appellate issues, our discussion and analysis will be limited to them.

At that time, it is the well-established law of Pennsylvania that the results of a polygraph examination are inadmissible evidence for all purposes because the scientific accuracy, reliability, and validity of such tests have not been sufficiently and adequately extablished.[4] In fact, the Pennsylvania evidentiary rule barring the results of a lie detector test or polygraph examination has been quite broad in its application under the case law. Testimony of an accused's willingness to take a test to establish his consciousness of innocence is inadmissible. Commonwealth v. Saunders, supra. The defendant may not introduce

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4. There is a long train of cases in support of this proposition; for example, Commonwealth v. Saunders, 386 Pa. 149, 125 A.2d 442 (1956); DeVito v. Civil Service Commission, 404 Pa. 354, 172 A.2d 161 (1961); Commonwealth v. Johnson, 441 Pa. 237, 272 A.2d 467 (1971); Commonwealth v. Camm, 443 Pa. 253, 277 A.2d 325 (1971); Commonwealth v. Brooks 454 Pa. 75, 309 A.2d 732 (1973); Commonwealth v. Tailey, 456 Pa. 574, 318 A.2d 922 (1974); Commonwealth v. Gee, 467 Pa. 123, 354 A.2d 875 (1976);

this type of incompetent evidence aimed at establishing his innocence. Commonwealth v. Brooks, supra: Commonwealth v. Talley, supra. Equally as well, it is improper for the Commonwealth to introduce such evidence for the purpose of establishing the defendant's guilt. DeVita v. Civil Service Commission, supra; Commonwealth v. Camm, supra. A close analysis of this line of casis which dictate the grant of a mistrial in trial instances in which there have been prohibited references to a polygraph examination discloses that they are specifically and solely directed to such references that pertain to the defendant which could give rise to inferences of either his guilt or innocence. Commonwealth v. Camm, supra; Commonwealth v. Garland, supra; Commonwealth v. Johnson, 273 Pa. Super. 14, 416 A.2d 1065 (1979). Since the two challenged references to lie detector tests merely implicated the credibility of Teri Price as a Commonwealth witness, and they did not pertain to either McKendrick's guilt or innocence, the teachings of the line of cases that a mistrial was warranted are inapposite to this case.

(Footnote No. 4 is continued.)

Commonwealth v. Cain, 471 Pa. 140, 369 A.2d 1234 (1977); Commonwealth v. Kemp, 270 Pa. Super. 7, 410 A.2d 870 (1979); Commonwealth ex rel Riccio v. Dilworth, 179 Pa. Super. 65, 115 A.2d 865 (1955); Commonwealth v. McKinley, 181 Pa. Super. 610, 123 A.2d 735 (1956); Commonwealth ex rel. Hunter v. Banmiller, 194 Pa. Super. 448, 169 A.2d 347 (1961); Commonwealth v. Chapman, 255 Pa. Super. 265, 386 A.2d 994 (1978); Also see, Wharton's Criminal Evidence §630 (13th Ed. by C.E. Torcia, 1973).

The prejudicial effect of remarks made by a witness must be measured in the trial context in which they were made. Commonwealth v. Stolzfus, 462 Pa. 43, 337 A.2d 873 (1975); Commonwealth v. Perillo, 474 Pa. 63, 376 A.2d 635 (1977). However, it is not every remark, statement or comment by a witness, even is unwise, irrelevant, or prejudicial which warrants a new trial, but the language must be such that its unavoidable results would be to prejudice the jury, forming in their minds fixed hostility and bias toward the accused, so that they cannot weight the evidence and render a true verdict by an objective determination. Commonwealth v. McNeal, 456 Pa. 394, 319 A.2d 669 (1974); Commonwealth v. Rolison, 473 Pa. 261, 374 A.2d 509 (1977); Commonwealth v. Starks, 479 Pa. 51, 387 A.2d 829 (1978); Commonwealth v. Brown, 489 Pa. 70, 414 A.2d 70 (1980). Here, Price's remarks concerning his own submissions to polygraph examinations merely had a possible impact on his own believability as a witness, and, in no way, eroded the presumption of innocence accorded McKendrick in the minds of this jury. Further, Price's remarks did not affect the objective determination of McKendrick's guilt by his jury. In fact, as will be discussed, Price's own reference to the lie detector tests probably served as negative factors which influenced this jury to disbelieve him.

Further, a close perusal of Price's testimony would disclose that he was a psychologically abnormal, emotionally distraught, and possibly intimidated Commonwealth witness. By fair appraisal, Price's prohibited references to the lie detector tests were unprovoked, uninstrigated, and perhaps unwanted nonresponsive

answers to proper questions on direct examination put to him by the prosecutor. In this case, the prosecutor was not guilty of any wrongful conduct instrumental in bringing about the prohibited responses from Price, an admitted homosexual who cried, trembled, and shook as he testified in the witness box. Thus, this case was not an instance in which the Commonwealth intentionally violated evidentiary rules by utilizing polygraph testing results for the purpose of rehabilitating the credibility of one of its witnesses on redirect examination. Commonwealth v. Johnson, supra; Commonwealth v. Kemp, surpa.

Further, in the trial context, it is submitted that Price's admissions that he had lied to the police, thereby requiring polygraph examinations, served to erode his credibility and so help the defendant. As is more fully discussed in Part III, infra of this Opinion, Price's credibility was impeached by the use of various impeachment techniques: (1) the use of two inconsistent statements he had made to the police; (2) the admitted grant of immunity given to him by the prosecution in exchange for his testimony; (3) the use of inconsistent statements given during an interview with defense counsel; (4) the use of inconsistent statements which he had made as a Commonwealth witness at the preliminary hearing in this case. Thus, when weighed in the full context of his trial testimony, Price's references to the need for police-administered polygraph examinations could only serve to impress the jury of the fact that he was a potentially mendactious

witness who also was disbelieved by the police. Admittedly, the reference to lie detector tests could have served to bolster the credibility of two consistent statements given by Price subsequent to testing. These two consistent statements were used by the prosecutor to rehabilitate Price on redirect examination. [See, Exhibits C-36 and C-37] However, the references to the polygraph did create a juror image to the effect that the police found Price to be an extrajudicial liar. In fact, defense counsel also agrees with this Court's appraisal of Price as an unworthy and discredited witness. Defense counsel's appraisal of Price's testimony is found in his written Brief in support of post-verdict motions, as follows: "The prosecution's star witness, and the only eyewitness beside defendant, was not only thoroughly impeached during cross-examination, but impeached himself by giving at least four different accounts of what had transpired on the day in question..." [Defense post-verdict Brief at pages 12-13]

Finally, this Court's cautionary instructions that the jury was to disregard the reference to a lie detector test, that credibility was a sole jury function, and that the prejudicial reference was to be ignored served to erase any prejudice in the minds of this instant jury. Upon a fair appraisal in the trial context, such instructions were specifically tied to the prejudicial remarks, were promptly given, and were clearly and firmly worked to advise the jury that such remarks were to be disregarded. Commonwealth v. Shoemaker, supra; Commonwealth v. Martinolich, supra; Commonwealth v. Talley, supra; Commonwealth v. Wiggins, supra.

Consequently, this second assignment of error is meritless.

[J-#266]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	NO. 296 JANUARY TERM 1979
	:	
v.	:	APPEAL FROM THE JUDGEMENT
	:	OF SENTENCE DATED JUNE 26,
CAROLYN McKENDRICK	:	1979 OF THE COURT OF COMMON
Appellant	:	PLEAS CRIMINAL DIVISION,
	:	COUNTY OF PHILADELPHIA AT
	:	NOS. 1205-1208 OF JUNE
	:	TERM, 1977
	:	
	:	ARGUED: OCTOBER 21, 1982

ORDER

PER CURIAM. FILED: December 20, 1982

Judgment of sentence affirmed.

Supreme Court of Pennsylvania
Eastern District

COMMONWEALTH OF PENNSYLVANIA

vs.

CAROLYN McKENDRICK,
Appellant

No. 296 January Term, 1979

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the JUDGMENT of the COURT of COMMON PLEAS, TRIAL DIV., CRIMINAL SECTION - PHILADELPHIA COUNTY, be, and the same is hereby AFFIRMED.

BY THE COURT:

Marlene F. Lachman, Esq.
Prothonotary

Dated: December 20, 1982